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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-218, Tibbals v. Carter.

5 Ms. Schimmer.

6 ORAL ARGUMENT OF ALEXANDRA T. SCHIMMER

7 ON BEHALF OF THE PETITIONER

8 MS. SCHIMMER: Mr. Chief Justice, and may it
9 please the Court:

10 This case is here from the Sixth Circuit,
11 which held that habeas claims can be stayed indefinitely
12 because prisoners have a statutory right to competence
13 to assist in their case, but even Mr. Carter now disowns
14 the circuit's rationale, and the court's indefinite stay
15 order was wrong for two other reasons.

16 First, habeas claims cannot be stayed
17 indefinitely. Doing so is fundamentally incompatible
18 with the timeliness concerns underlying AEDPA.

19 Second, while we readily acknowledge that
20 limited stays will be appropriate in some situations,
21 this is not one of them. All of Mr. Carter's claims are
22 record based and, therefore, resolvable without his
23 assistance.

24 JUSTICE KAGAN: What situations would they
25 be appropriate in?

1 MS. SCHIMMER: Limited stays, we think, Your
2 Honor, would be appropriate in situations where the
3 prisoner's ability to effectively communicate with his
4 counsel or to disclose evidence would be necessary to
5 his claim. And we think that would be true in a case,
6 potentially, where AEDPA does not restrict Federal
7 review to the state court record.

8 So here, for instance, we think that the
9 prisoner's assistance would not be necessary, and,
10 therefore, even a limited stay would not be appropriate,
11 because all of Mr. Carter's claims were vetted before
12 the state courts and decided on the merits. And
13 therefore, under 2254(d) in this Court's decision in
14 Pinholster, the Federal court is limited to reviewing
15 the state court record.

16 We don't think that the prisoner's
17 assistance in that case is necessary. We don't think
18 Mr. Carter has made a case for why his assistance would
19 be necessary in this specific case.

20 JUSTICE KENNEDY: Well, why -- why shouldn't
21 the rule be that an indefinite stay is never necessary;
22 you just proceed based on the evidence you have?

23 Sometimes we have evidence where a witness
24 is missing. We have to go on with the case. Then it
25 could be open to argue in a later case that there was

1 new evidence that was not available.

2 MS. SCHIMMER: Well, we absolutely agree,
3 Justice Kennedy, that indefinite stays are never
4 appropriate, regardless of the circumstances; that
5 indefinite stays contravene AEDPA's timeliness concerns.
6 And to the extent that all of the parties in this case
7 agree now that, to the extent district courts have some
8 power to issue stays -- we say only limited stays -- in
9 these cases, that power is grounded in equitable
10 discretion. And we do not think that it comports with
11 equitable discretion to allow a prisoner essentially to
12 win his case, to obtain a suspension of his capital
13 sentence, the ultimate end relief that he seeks --

14 JUSTICE KENNEDY: What about the second part
15 of the equation? Suppose that there's no stay, that the
16 habeas proceeding is adjudicated against the petitioner.
17 He then becomes competent and claims there's new
18 evidence. Would that be grounds to reopen, you think?

19 MS. SCHIMMER: We think in those situations,
20 certainly the State of Ohio wouldn't contest, for
21 instance, under 2254(b), that if you were incompetent
22 before, that that would be a legitimate basis
23 potentially for not having been able to reasonably
24 discover a new claim, if one had a new claim.

25 So we do think that moving forward, that no

1 indefinite stay should be permitted. And when the
2 courts move forward, yes, if someone's competency is
3 later restored, there are backstops. The person,
4 certainly in Ohio, can always go back to state court --

5 JUSTICE KENNEDY: And would the backstop be
6 newly discovered evidence?

7 MS. SCHIMMER: The backstop would be a newly
8 discovered claim, I would say. I think that would be
9 what --

10 JUSTICE KAGAN: Ms. Schimmer, if you are
11 right that no stay was appropriate in these
12 circumstances, we would never reach the question of how
13 much of a stay is appropriate in other circumstances.
14 Isn't that right?

15 MS. SCHIMMER: I think that's right.
16 Because I think, to the extent that using this case as a
17 springboard, the Court could draw the boundary line --
18 could draw one bright boundary line and say indefinite
19 stays are never permitted, but limited stays might be
20 permitted in cases where the claims are not record
21 based.

22 JUSTICE KAGAN: I'm saying the exact
23 opposite.

24 MS. SCHIMMER: Oh.

25 JUSTICE KAGAN: In other words, if there was

1 one bright line which says that stays are not
2 appropriate in a record-based claim because there's
3 really nothing that the client can contribute, then we'd
4 have no need or cause to reach the second question of
5 what happens, in a case where a stay might be
6 appropriate, how long that stay should be.

7 MS. SCHIMMER: That's correct, Your Honor.
8 I'm sorry, I agree. I agree with you that the Court
9 could rule on that ground.

10 JUSTICE SCALIA: Alternatively, we could --
11 we could rule that indefinite stays are never
12 appropriate; in which case, it would be unnecessary to
13 decide whether any stay is appropriate where -- for a
14 record-based claim, right?

15 MS. SCHIMMER: That is true, too. That
16 is --

17 JUSTICE SCALIA: We can do it from either
18 end.

19 MS. SCHIMMER: That is true, too --

20 JUSTICE SCALIA: Or we could decide both, I
21 suppose.

22 MS. SCHIMMER: I suppose, yes. I mean, we
23 would urge the Court to, I think, do both, to say --

24 JUSTICE SOTOMAYOR: Am I -- am I
25 understanding that your position in response to the

1 question from Justice Scalia and Justice Kennedy is that
2 for you, indefinite is any stay whatsoever?

3 It sounds like what you are proposing, or in
4 response to them, is that no stay for purposes of
5 determining competence, whether it's short or long, is
6 permissible. Is that your argument?

7 MS. SCHIMMER: That is not our argument,
8 Justice Sotomayor. Our -- our definition of an
9 indefinite stay is a stay that is imposed until the
10 prisoner is restored to competence. That --

11 JUSTICE GINSBURG: Like -- like the stay in
12 Rees.

13 MS. SCHIMMER: Like the stay in Rees, or,
14 really, like the stay the Sixth Circuit has issued.

15 JUSTICE GINSBURG: You would have to -- to
16 maintain your position, the Court would have to qualify
17 Rees, or at least the interpretation that says the stay
18 should be indefinite once the petitioner is found
19 incompetent, because that's what happened there. The
20 Court said, find out if he's competent. The answer was,
21 he is incompetent. And then the Court just let it sit
22 until the man died.

23 MS. SCHIMMER: Well, Your Honor, we don't
24 think that Rees really has any force or provides any
25 guidance in this case. That, of course, was a case

1 where a prisoner was seeking to abandon his further
2 appeals.

3 There are multiple reasons why we think that
4 Rees does not endorse the power of Federal courts to
5 indefinitely stay habeas proceedings.

6 One is the fact that the Court's stay order
7 was completely unexplained and very terse, didn't
8 announce any rule of law. Second, the historical record
9 shows that the Court's stay in Rees was, at most, a
10 judicially negotiated settlement, meaning far from a
11 demonstration of the Court's inherent power. It seemed
12 to be a very carefully orchestrated exercise of
13 consented-to power.

14 The third point is that --

15 JUSTICE SOTOMAYOR: I could take objection
16 to that characterization, because the clerk of the Court
17 told the Court that neither party was happy with what
18 was happening, and the Court still entered the order.

19 But let me go back to my question a moment.
20 Amici say that most competency issues are resolved
21 within months and that many individuals, the vast
22 majority, are restored to competency with proper
23 medication within months. Are you opposing those kinds
24 of stays?

25 MS. SCHIMMER: Not in -- not where it's

1 appropriate, no, Your Honor. And again, Your Honor, our
2 definition of an indefinite stay is --

3 JUSTICE SOTOMAYOR: But under your
4 definition, it's never appropriate, really.

5 MS. SCHIMMER: No.

6 JUSTICE SOTOMAYOR: You argue -- you argue
7 two things. You say, under Pinholster, courts always
8 have to rely on the record.

9 MS. SCHIMMER: Correct. We would -- here's
10 how we would taxonomize the appropriateness of stays.
11 We would say indefinite stays are never permitted,
12 meaning a court can never premise a stay exclusively on
13 the restoration of the prisoner's competency, in saying
14 however long it takes --

15 JUSTICE SOTOMAYOR: Even though a doctor
16 says, it can be done, we have to try?

17 MS. SCHIMMER: If a doctor says, it can be
18 done, we have to try, and it's a situation where it's
19 appropriate --

20 JUSTICE SOTOMAYOR: Well, they can never
21 say, it can be done. They can say --

22 MS. SCHIMMER: Right.

23 JUSTICE SOTOMAYOR: -- we have to try.

24 MS. SCHIMMER: There is a reasonable
25 probability that it can be done. We would say,

1 Your Honor --

2 JUSTICE SOTOMAYOR: That's also -- I'm not
3 sure how they can do that until they try.

4 MS. SCHIMMER: Right. So we would say in
5 certain situations, yes, that would be perfectly
6 appropriate.

7 The State of Ohio certainly agrees that
8 having a competent prisoner is a desirable thing in a
9 habeas case and that courts do have some discretion to
10 try to vindicate that goal.

11 Our point, though, is simply that it cannot
12 come at all cost, meaning --

13 JUSTICE SCALIA: Rees was not an indefinite
14 stay in -- in the absolute sense, was it?

15 MS. SCHIMMER: No.

16 JUSTICE SCALIA: Because the trial
17 proceeded. There was going to be an end, right?

18 MS. SCHIMMER: Well, the Court -- the Court
19 in the end held up the cert petition for several decades
20 without deciding the case. And in the end Mr. Rees died
21 and then the cert petition was ultimately later
22 dismissed.

23 CHIEF JUSTICE ROBERTS: I don't understand
24 how your approach works. The defendant, the habeas
25 petitioner, the allegation is made: I'm incompetent,

1 there is support for it. The district court says:
2 Okay, I can't enter an indefinite stay, but you are
3 going to be treated; I want you to come back in 6
4 months, okay, and we will look at it then.

5 He comes back in 6 months, and there's been
6 no change. What happens then? Another 6 months? At
7 what point does it become indefinite?

8 MS. SCHIMMER: Right. Well, since we are
9 playing on the field of equitable discretion,
10 Your Honor, it's going to be difficult to put forward a
11 hard and fast rule.

12 But Justice Sotomayor rightly points --

13 CHIEF JUSTICE ROBERTS: Well, give me a
14 loose and soft rule. I mean, is it --

15 MS. SCHIMMER: Sure. A loose and soft rule.

16 CHIEF JUSTICE ROBERTS: -- is it two years,
17 or is it ten years?

18 MS. SCHIMMER: We would say presumptively a
19 year. And we think there is support for that, even from
20 Mr. Carter's own amici.

21 The brief of the American Psychiatric
22 Association, pages 19 to 21, and especially footnote 30,
23 talks about how most prisoners who are ultimately
24 successfully restored to competency, that does happen in
25 a matter of months, 6 to 9 months at the longest end;

1 about 90 percent of them are restored within 6 to 9
2 months. So we think, presumptively, a year would be an
3 appropriate period of time for --

4 JUSTICE KAGAN: Well, Ms. Schimmer, why
5 would that be? I mean, assume a case where you say a
6 stay would be appropriate. So it's not a closed record
7 case; it's a case where the client might be expected to
8 provide information that's -- let's assume it's
9 necessary to a full and fair adjudication of the habeas
10 claim. Why would you cut it off at a year? Why
11 wouldn't it be still true in 2 years, that a full and
12 fair adjudication couldn't take place in those
13 circumstances?

14 MS. SCHIMMER: Well, we think, Your Honor,
15 at the point at which you say that the test for a
16 limited stay is however long it takes to restore
17 somebody's competency is the point at which we have
18 returned to the definition of saying that indefinite
19 stays are proper.

20 And the bottom line is that we think that --

21 JUSTICE KAGAN: Well, it's not an indefinite
22 stay. I think the judge would do what the Chief Justice
23 suggested, that, you know, it's not for ever and ever.
24 We're just going to come back to it periodically. But
25 if the answer is the same, which is that the client's

1 participation is necessary for a full and fair
2 adjudication, then the Court's answer should be the
3 same, too. Why isn't that right?

4 MS. SCHIMMER: Because we do think that
5 there comes a point, given the finality concerns
6 underlying AEDPA, that a limited stay, when that window
7 expires -- the person has a reasonable period of time to
8 be restored to competency; that when that window
9 expires, at some point the proceedings do have to
10 continue.

11 JUSTICE SCALIA: Well, it's really not the
12 same question when it comes back, is it? Because there
13 are two questions: Is reasonable competence useful for
14 his defense; but, also, the second question, is there a
15 reasonable probability that he can be restored to
16 competence?

17 The first time, there obviously is that, and
18 you give him a year. When you come back a second time,
19 you say, well, it's been a year. They usually come back
20 within 6 to 9 months. There is no longer a reasonable
21 probability.

22 MS. SCHIMMER: That's exactly right,
23 Justice Scalia. And to the extent that we are balancing
24 different parties' interests in these cases, after the
25 preliminary limited stay expires, we believe at that

1 point the prisoner's interest in a continued stay has
2 diminished, and the State's interest in the proceedings
3 continuing and moving forward has then increased, and
4 that the court should then move on.

5 JUSTICE GINSBURG: There be no stay at all
6 unless it's necessary for just adjudication of the
7 claim, so that would be a threshold question.

8 MS. SCHIMMER: That would be the threshold
9 question, and there seems to be a good amount of
10 consensus on that point. It's the test articulated by
11 the Sixth and Ninth Circuits and by my colleague here
12 today. And we're willing to accept that as the test for
13 when limited stays can be imposed.

14 With that, if there aren't further questions
15 I'll reserve the remainder of my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Michelman.

18 ORAL ARGUMENT OF SCOTT MICHELMAN

19 ON BEHALF OF THE RESPONDENT

20 MR. MICHELMAN: Mr. Chief Justice and may it
21 please the Court:

22 Ohio and the United States have agreed today
23 that courts have the authority to stay habeas
24 proceedings when the petitioner is mentally incompetent.
25 So then the questions for this Court are when may such

1 stays issue and how long may such stays be.

2 The Court's answers should reflect the
3 important principle that no individual should lose
4 potentially meritorious claims because of mental
5 illness.

6 I'd like to begin by addressing --

7 JUSTICE SOTOMAYOR: Petitioner says they
8 won't because they can come back with new evidence after
9 habeas is closed. Why is that inadequate?

10 MR. MICHELMAN: I think that's -- that's a
11 crucial question, Justice Sotomayor, that
12 Justice Kennedy asked as well. And it goes to the
13 limits on second or successive petitions. They can't
14 come back if they are later competent if they first lose
15 their claim because they didn't have the evidence they
16 needed and then try again later. They are subject to
17 the bar on second or successive petitions, which
18 requires not only that they have new facts, but also
19 that they have new law. So that's a very restrictive
20 standard that would not allow them to simply pick up
21 where they left off.

22 CHIEF JUSTICE ROBERTS: I'm sorry, I didn't
23 follow that exactly. What -- what prevents them from
24 picking up where they left off?

25 MR. MICHELMAN: Mr. Chief Justice,

1 section 2244(b), the bar on second or successive
2 petitions.

3 Imagine Mr. Carter has a potentially
4 meritorious claim now that he can't speak to because of
5 his incompetence, it's adjudicated without him, he loses
6 it.

7 CHIEF JUSTICE ROBERTS: Oh, it's
8 adjudicated, okay.

9 MR. MICHELMAN: Imagine it's adjudicated
10 without him, he loses it, and then he can't simply waltz
11 back into court and say: I'm here, I'm competent; hear
12 me out.

13 JUSTICE SOTOMAYOR: I'm presume -- I presume
14 that the one claim among your many -- yours is the
15 defendant who was excluded from trial, correct?

16 MR. MICHELMAN: Yes, Justice Sotomayor.

17 JUSTICE SOTOMAYOR: So that if he comes back
18 and says, I told my attorneys I would behave, and I
19 wanted to come back earlier, but they never let me back
20 in, this would not be a new claim, this would be part of
21 the old claim that has been adjudicated, correct?

22 MR. MICHELMAN: Yes, Justice Sotomayor.

23 JUSTICE SOTOMAYOR: But without his
24 information.

25 MR. MICHELMAN: Yes. And, in fact, the

1 record lends some support to this suggestion by showing
2 that counsel frequently put their own safety and their
3 own concerns ahead of my client's interests, for example
4 stating on the record -- and I'm quoting here from trial
5 counsel -- "I am still worried about him behaving during
6 this phase. So the bottom line is, he wants to stay
7 where he is." So there is a question of whether trial
8 counsel was really looking out for Mr. Carter's
9 interests at that time.

10 There's also the question of whether --

11 JUSTICE SOTOMAYOR: Well, that you could see
12 from the record. The question in my mind would be
13 whether he told counsel he would behave and counsel
14 ignored that information, correct?

15 MR. MICHELMAN: Yes, Justice Sotomayor.
16 There is strong support in the record to suggest that
17 Mr. Carter has additional information to provide, both
18 about his desire to return to the courtroom and about
19 his competence once he was removed from the courtroom.
20 Was he hallucinating during the trial? Could he see it?
21 Could he communicate with counsel?

22 JUSTICE KENNEDY: Could you help me with
23 your discussion of 2244(b)? I have it in front of me.
24 And the hypothetical was that he's incompetent, his
25 claim is adjudicated, then he becomes competent, and he

1 says now there is some new evidence which could not have
2 been discovered.

3 I thought you told us that you not only have
4 to have new evidence, but new law. That's not the way I
5 read --

6 MR. MICHELMAN: I'm sorry.

7 JUSTICE KENNEDY: -- (b)(2)(B)(1), unless I
8 misunderstood you.

9 MR. MICHELMAN: No, you're right,
10 Justice Kennedy. I misspoke. He needs new law or new
11 facts, but the new facts have to come with a showing of
12 actual innocence. I misstated that. I apologize.

13 But, either way, new law is --

14 JUSTICE KENNEDY: No, no, no.

15 MR. MICHELMAN: -- new facts are not enough.

16 JUSTICE KENNEDY: This says, "or the factual
17 predicate for the claim could not have been discovered
18 previously through the exercise of due diligence,"
19 period.

20 MR. MICHELMAN: And --

21 JUSTICE KENNEDY: Yes?

22 MR. MICHELMAN: And (b)(2) --

23 JUSTICE KENNEDY: Yes?

24 MR. MICHELMAN: --- "the facts underlying
25 the claim, if proven, would show that but for the

1 constitutional error" --

2 JUSTICE KENNEDY: Yes, clear and convincing,
3 that's true.

4 MR. MICHELMAN: Right. So he needs not only
5 the new facts, but needs to meet that higher standard
6 showing that no reasonable factfinder would have found
7 him guilty.

8 But one of his claims, his ineffective
9 assistance of counsel in mitigation, goes to not his
10 guilt, but his punishment. So that claim would be
11 barred under 2254. Additionally, his competence doesn't
12 go to his guilt either.

13 JUSTICE ALITO: Well, is it your position
14 that any time a petitioner raises an ineffective
15 assistance of counsel claim, the habeas proceeding can
16 potentially be stayed indefinitely?

17 MR. MICHELMAN: That's potentially correct,
18 Justice Alito. But I would emphasize the role of the
19 district courts as gatekeepers for only potentially
20 meritorious claims that are truly suggested on the
21 record that someone --

22 CHIEF JUSTICE ROBERTS: I'm sorry, finish
23 your answer.

24 MR. MICHELMAN: -- where it's truly
25 suggested on the record that the petitioner could help,

1 if competent, so that we wouldn't be engaging in
2 imaginative speculation or claims that were purely
3 record based.

4 CHIEF JUSTICE ROBERTS: So it's a truly
5 suggested by the record standard?

6 MR. MICHELMAN: Well, I would say that it
7 would be suggested by the record. I'm not sure the
8 adverb truly is necessary.

9 CHIEF JUSTICE ROBERTS: Well -- well, how is
10 it compared to a motion to dismiss standard?

11 MR. MICHELMAN: Well, I would look to this
12 Court's decision --

13 CHIEF JUSTICE ROBERTS: Is it more
14 stringent?

15 MR. MICHELMAN: I think it would be -- well,
16 I guess, not compared to the Iqbal standard, Your Honor.
17 Probably the plausibility standard would actually be
18 somewhat analogous, although --

19 CHIEF JUSTICE ROBERTS: Well, now we've gone
20 from plausible to truly -- plausible -- well, truly
21 suggested by the record. I mean, suggested by the
22 record might be plausible.

23 It seems to me that it's a pretty loose
24 standard that entitles the defendant to a stay.

25 MR. MICHELMAN: Well, but that's not the

1 only criterion, Mr. Chief Justice. It would be not only
2 that it was suggested by the record that it was a
3 potentially meritorious claim, as the district court
4 found, and the standard this Court endorsed in Rhines,
5 but also that the petitioner is genuinely incompetent.
6 This doesn't happen very often.

7 In fact, in the state's amicus brief
8 discussing how, in their characterization, this type of
9 litigation has exploded in the Ninth Circuit, in their
10 characterization, they pointed only to nine cases in the
11 past nine years, so -- and not all of those resulted
12 in --

13 JUSTICE ALITO: Well, why isn't what you're
14 proposing just a mechanism that will permit stays in
15 virtually every capital case, if that's what the
16 petitioner wants -- if that's what petitioner's counsel
17 wants?

18 Let's say you have a case where there is a
19 small amount of mitigating evidence about the
20 petitioner's childhood, but not enough to sway the
21 sentencing authority. It's alleged that if the
22 petitioner had been -- if the petitioner was competent,
23 the petitioner could provide a lot more information
24 about what went on during his childhood years; and,
25 therefore, the proceeding has to be stayed indefinitely

1 until the petitioner is restored to competence or he
2 dies, as happened in Rees. What do you do with that
3 situation?

4 MR. MICHELMAN: Justice Alito, I think
5 district courts have a wide amount of discretion in that
6 matter, and they could say, well, it looks like there is
7 a little evidence here, but, based on what I think you
8 could tell me, I don't think there is enough.

9 Here, by contrast, the district court did
10 find that Mr. Carter's competent assistance was
11 necessary. So I think we have to trust the district
12 courts to be gatekeepers --

13 JUSTICE ALITO: So if the district court
14 says, well, there's a little bit here, and I can't rule
15 out the possibility that there might be a lot more
16 that's locked in the petitioner's mind, but he is unable
17 to provide it because he is incompetent, then I'm going
18 to grant a stay until he is restored to competence; and,
19 then that would be insulated from being overturned on
20 appeal by abuse of discretion standard; that's what
21 you're arguing?

22 MR. MICHELMAN: That's -- that's correct,
23 Justice Alito. That would be something --

24 JUSTICE ALITO: Do you think that is
25 consistent with AEDPA; that Congress, knowing, in

1 particular, that a lot of district judges and a lot of
2 court of appeals judges don't like the death penalty and
3 will go to some length to prevent the imposition of that
4 sentence, that we're just going to leave that all to the
5 discretion of every individual district judge?

6 MR. MICHELMAN: I think it is consistent
7 with AEDPA, Your Honor, because of this Court's recent
8 jurisprudence in Martinez, in Holland and Rhines, which
9 make clear that AEDPA did not pursue finality at all
10 cost. It did not eliminate the discretion, the
11 equitable discretion of the district courts that they
12 traditionally enjoyed, as this Court stated in Holland.
13 And as this Court stated in Martinez, the Court is
14 concerned that there could be claims that no court will
15 have heard, not the state court, not the Federal court.

16 JUSTICE SCALIA: Mr. Michelman, we have
17 established a different standard for the degree of
18 competence that has to exist in order to prevent
19 execution, right? The prisoner has to be aware of what
20 is being done and why it's being done.

21 MR. MICHELMAN: Yes, sir.

22 JUSTICE SCALIA: And that's a much lower
23 standard than the standard of competence required for
24 deciding whether he can assist counsel, right?

25 MR. MICHELMAN: It's a different standard,

1 Justice Scalia.

2 JUSTICE SCALIA: Well, it's -- no, it's a
3 much -- it's a much easier standard for the state to
4 establish.

5 MR. MICHELMAN: Well, it could be easier in
6 some cases, but harder in others. Mental -- mental
7 health science is complex, so one might be competent
8 to --

9 JUSTICE SCALIA: Well, wait. All he has to
10 know to prevent -- to prevent execution is he has to
11 know that he's being executed for a crime, right? And
12 --

13 MR. MICHELMAN: And he has to understand
14 why.

15 JUSTICE SCALIA: -- in order to assist
16 counsel, doesn't he have to know a lot more than that?

17 MR. MICHELMAN: That's true, Justice Scalia.
18 The test --

19 JUSTICE SCALIA: Well, just make believe
20 that I'm right about that, okay, that there are two
21 standards, and one is really quite more difficult than
22 the other. Why isn't the difference between the
23 standards utterly eliminated? Because whenever there is
24 a capital case, a habeas petition is filed, and counsel
25 says, my -- my client cannot -- cannot assist me. Oh,

1 yes, he understands why he's being executed, but he may
2 have a new claim, he may be able to tell me stuff, so we
3 have to stay the execution indefinitely until he can
4 assist -- assist me in continuing his defense.

5 You've just converted the standard for
6 proceeding with the execution from an easier one to a
7 much more difficult one.

8 MR. MICHELMAN: I don't think that's true,
9 Justice Scalia, because the two standards are different
10 and for different purposes. So there could be
11 individuals who meet one and not the other. It's not --
12 it's not an either/or choice.

13 JUSTICE KENNEDY: But then -- but then you
14 are fighting the arguendo assumption.

15 Let's assume that the Ford standard, the
16 standard for competence to be executed, is more lenient,
17 less -- less forgiving than competence to assist
18 counsel. Let's assume that.

19 Then Justice Scalia has to be right; you've
20 simply eliminated the Ford standard altogether.

21 MR. MICHELMAN: Not necessarily, Your Honor,
22 because even if one is easier --

23 JUSTICE GINSBURG: At least only -- only in
24 cases where the -- the claim of incompetence is genuine.
25 I mean, if anyone says, oh, I want to make -- take

1 advantage of the more defendant-friendly standard, all I
2 have to do is allege I'm incompetent.

3 But that's not the case. He has to be.
4 There has to be a hearing that determines he is, indeed,
5 incompetent. And most defendants I don't think would be
6 able to establish that they are, indeed, incompetent.

7 MR. MICHELMAN: That's right,
8 Justice Ginsburg. We -- our standard builds in the
9 assumption that there will be mental health experts that
10 will testify to the condition of the petitioner.

11 So the petitioner can't simply select a
12 standard and declare that he meets it. He would have to
13 satisfy mental health professionals that he meets that
14 standard, whether it's competency to be executed or
15 competency for these purposes. And so that will --

16 JUSTICE SCALIA: Mental health experts
17 always agree, don't they? Those provided by the defense
18 always agree with those provided by the prosecution.
19 Yes.

20 MR. MICHELMAN: I understand sometimes
21 that's not true, Justice Scalia, but that's why we rely
22 on the district courts to do what they do every day in
23 the trial competency context and adjudicate conflicting
24 claims about a petitioner's mental competence --

25 JUSTICE KENNEDY: Am I -- is it correct that

1 the petitioners in both cases -- pardon me, that the
2 criminal defendants in both cases here, the Respondents,
3 have all but conceded that there is no Constitutional
4 basis for the right to competency during habeas, or am I
5 overstating that?

6 MR. MICHELMAN: I don't think you are,
7 Justice Kennedy, though I won't speak for Mr. Gonzales.

8 Mr. Carter does not press a Constitutional
9 argument here, only the argument that a district court's
10 discretion, which the State of Ohio recognizes, to stay
11 habeas proceedings should cover --

12 JUSTICE KENNEDY: But once you concede the
13 Constitutional point, so that there's no fundamental
14 unfairness, then it seems to me that you have all but
15 given away your case.

16 MR. MICHELMAN: Well, I don't think there
17 needs to be Constitutional unfairness for there to be
18 unfairness. For instance, this Court's opinion in
19 Martinez --

20 JUSTICE KENNEDY: Well, it's fairness that's
21 not fundamental -- or --

22 MR. MICHELMAN: Well --

23 JUSTICE KENNEDY: It's unfairness that's not
24 fundamental.

25 MR. MICHELMAN: -- I think Martinez v. Ryan

1 is an excellent illustration of that point,
2 Justice Kennedy, because there, the Court held, not that
3 there was a Sixth Amendment right to effective
4 assistance of counsel at the habeas stage, but that
5 ineffective assistance on initial review collateral
6 proceedings could provide cause and prejudice to
7 overcome a procedural default in order that the
8 petitioner would not lose his claim, and that -- to
9 prevent a situation where no court would hear of the
10 claim before he was executed.

11 CHIEF JUSTICE ROBERTS: Well, but in that
12 case, the whole basis of the analysis was that, although
13 it was collateral, it really was the first opportunity
14 to raise a particular claim.

15 You say that, earlier, that trial judges do
16 this all the time in the trial context. It's an
17 important distinction in our jurisprudence if there's
18 difference in terms of the rights to which you are
19 entitled preconviction and post-conviction.

20 MR. MICHELMAN: That's --that's correct,
21 Mr. Chief Justice. But if the facts haven't been
22 presented -- and here what of the district court found
23 was there were facts missing, facts that were
24 exclusively within Mr. Carter's knowledge. They weren't
25 presented to the State court, they haven't been

1 available to either the State court or the Federal
2 court, so it's possible this man could be executed and
3 no one could have fully heard these potentially
4 meritorious claims.

5 CHIEF JUSTICE ROBERTS: What is your -- what
6 is your limit? You think there is no limit on the
7 inherent authority, that these things can go on and on?
8 Or as, I mean, your friend on the other side suggested,
9 1 year as a presumption? Do you have any limit?

10 MR. MICHELMAN: Well, we would leave it in
11 the first place to the district court's discretion.
12 We -- as far as the question of indefinite stays go, we
13 agree with the State of Ohio that most competency issues
14 are resolved within a matter of months, so we can
15 expect --

16 JUSTICE GINSBURG: But not this one, because
17 the claim is he was never competent; isn't that so? He
18 wasn't competent to stand trial, and he -- his mental
19 condition never improved.

20 So this person, if -- if the standard is
21 he's got to be competent, the likelihood is he will
22 never be competent because he wasn't even, according to
23 him, competent at the time he was tried.

24 MR. MICHELMAN: Yes, Justice Ginsburg. And
25 this -- this would be a rare case in which a stay might

1 need to be more than 6 months, 9 months, a year. But
2 because most -- in most situations, the competency issue
3 will resolve in a short period of time, this Court
4 shouldn't fear that it's opening the floodgates to long
5 stays in many, many cases. There -- this is a rare case
6 with a very severely ill man with potentially
7 meritorious claims that require his assistance. That's
8 not something that --

9 JUSTICE ALITO: Why can't the competency --
10 why can't the issue of competency at trial be resolved?

11 MR. MICHELMAN: Well, because the issue --

12 JUSTICE ALITO: You have to be competent
13 during the habeas proceeding in order to assist in
14 proving that he was -- that he was incompetent at the
15 time of trial?

16 MR. MICHELMAN: Yes, Justice Alito. And
17 that's because the competency question at this point is
18 retrospective. We're not talking -- it's not a matter
19 of simply examining Mr. Carter today and saying, "How do
20 you feel? What do you experience? Are you hearing the
21 voice of the devil?" But it's a question of was he
22 doing that during his trial 14 years ago. And that's
23 why it's important that he be able to participate now.

24 What the Sixth Circuit ordered in this case
25 was a remand for a narrow stay with appropriate

1 monitoring by the district court to make sure that this
2 didn't become just sit around on the docket for years
3 with nobody looking at it.

4 CHIEF JUSTICE ROBERTS: Did you say that the
5 question is whether or not, not whether he is competent
6 today to assist his counsel, but whether he was 14 years
7 ago?

8 MR. MICHELMAN: Yes, Mr. Chief Justice.

9 CHIEF JUSTICE ROBERTS: How in the world --

10 MR. MICHELMAN: With respect to the
11 underlying claim. That's the question.

12 CHIEF JUSTICE ROBERTS: Right. How is a --
13 do mental health professionals make those determinations
14 on a regular basis?

15 MR. MICHELMAN: I understand that they do,
16 Your Honor. I understand it is possible for a person
17 with a psychosis to recover and have memories of
18 experiences during that psychosis. Now, I admit that's
19 not a fact in the record, but that's something that, if
20 we're dispositive, could be established on remand in
21 this case.

22 So it's because of the rarity of these
23 claims, because they are not going to come up every day,
24 and because district courts exist as strong checkpoints
25 to prevent non-genuine claims of competence or not

1 potentially meritorious claims for which the
2 petitioner's assistance is necessary, a narrow stay
3 authority should be preserved and should be applied to
4 Mr. Carter's case.

5 JUSTICE GINSBURG: But not staying
6 everything, according to the Sixth Circuit. The Sixth
7 Circuit said that there are issues or may be issues that
8 can go forward right away. And as to that, is there any
9 issue that could be argued despite the incompetence?

10 MR. MICHELMAN: Yes, Justice Ginsburg.

11 JUSTICE GINSBURG: What are they?

12 MR. MICHELMAN: Well, in this case -- and I
13 think it really illustrates the narrowness of the Sixth
14 Circuit's order. In this case he had, for example,
15 claims about the jury instructions. He had claims about
16 prosecutorial misconduct. He has a claim about the
17 method of execution that the State of Ohio uses. These
18 claims may go forward because they don't require his
19 assistance. And it's a measure of the Sixth Circuit's
20 moderation and discretion that they held that only the
21 claims that genuinely require his assistance should be
22 stayed; the others may go forward with the help of the
23 next friend.

24 CHIEF JUSTICE ROBERTS: That's a pretty
25 inefficient system, isn't it, that a judge has to learn

1 a particular record to dispose of claims 1 through 9,
2 when he knows that he's not going to be able to dispose
3 of the petition until the petitioner is competent, maybe
4 a year later, then he has to go through the whole thing
5 again? I don't see a district court saying, "Well, I'm
6 not going to get into this until I can dispose of the
7 whole thing."

8 MR. MICHELMAN: Well, I suppose there would
9 be some appeal to the notion that the district court
10 might stay the rest of it, simply waiting, Your Honor;
11 but we don't think that's likely to happen frequently.
12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Ms. Schimmer, you have three minutes
15 remaining.

16 REBUTTAL ARGUMENT OF ALEXANDRA T. SCHIMMER

17 ON BEHALF OF THE PETITIONER

18 MS. SCHIMMER: Thank you. First off, are
19 there is nothing narrow about what the Sixth Circuit
20 held. At page 15-A of the petition appendix, the Sixth
21 Circuit ordered that all of the ineffective assistance
22 of counsel claims be stayed until Mr. Carter is
23 competent, meaning these claims will be stayed at any
24 and all cost to the progress and finality of the
25 proceedings.

1 JUSTICE SOTOMAYOR: Could you tell me what
2 the value is to wait for the Ford analysis or the Ford
3 examination to the time of execution?

4 MS. SCHIMMER: We think there are a few
5 values, Justice Sotomayor. First of all is that the
6 state has -- still has an interest. First of all, we
7 don't concede Mr. Carter is Ford incompetent. Those --

8 JUSTICE SOTOMAYOR: Putting that aside.

9 MS. SCHIMMER: Putting that aside, though,
10 the state's interest is that it still has this powerful
11 interest in the finality of its conviction and sentence.

12 JUSTICE SOTOMAYOR: "At all costs" is what
13 you seem to be saying.

14 MS. SCHIMMER: No. But even if the
15 implementation of that sentence is ultimately
16 forestalled by a Ford ruling, that's true in a dignitary
17 sense, but it's also true in a practical sense, mean the
18 state should not -- if somebody gains competence
19 many years down the line, the whole point of AEDPA is
20 that the state at that time should not have to be
21 litigating a stale case. And to wait potentially 5 and
22 10 and 15 years until someone's competency is restored
23 on this total speculation that something might happen --

24 JUSTICE SOTOMAYOR: Well, your adversary has
25 not said it's total speculation. He suggests that if we

1 set a standard that requires -- we can talk about what
2 the terms are: suggestive in the record, plausible in
3 the record, typical sort of situation -- but assuming
4 that there is some basis to believe that the defendant
5 can provide information of importance to the claim, why
6 should that be -- that door be shut?

7 MS. SCHIMMER: Well, again, Your Honor --

8 JUSTICE SOTOMAYOR: And how do you deal with
9 his answer that if the claim is not a new claim, but
10 just new information about an old claim, that he will be
11 barred from a successive petition?

12 MS. SCHIMMER: Right. Well, we still don't
13 see how that has any traction in a case like this where,
14 whether competent or not competent, 2254(d) and
15 Pinholster say this claim -- all of these claims were
16 adjudicated on the merits in state court, and,
17 therefore, no new evidence can be considered by the
18 Federal court. So that, we think, resolves that.

19 And in terms of how you deal with limited
20 stays and then going on, we would say simply that the
21 State of Ohio's experience in this case has been that
22 the State of Ohio has been standing ready for ten years
23 to defend the judgment of its state courts in this case,
24 even though all of Mr. Carter's claims are record based.
25 There is no right to competence; everybody seems to

1 agree on that. Indefinite stay has contravened AEDPA,
2 and we don't think that any stay is justified here
3 because of the record-based claims.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 (Whereupon, at 10:40 a.m., the case in the
7 above-entitled matter was submitted.)

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